Supreme Court, U.S.
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92-762

No. _____

UNITED STATES SUPREME COURT

October 1992 TERM

DIANA M. MAULDING Petitioner

v.

LOUIS W. SULLIVAN, Secretary of Department of Health and Human Services; DEPARTMENT OF HEALTH AND HUMAN SERVICES Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

APPENDIX PETITION FOR WRIT OF CERTIORARI
VOL. 1 OF 2

Diana M. Maulding
Petitioner
1406 Ivy Chapel Road
Little Rock, AR 72206

501-888-7180

TABLE OF CONTENTS FOR APPENDIX
VOL. 1 OF 2

Opinion of the Court of Appeals 1

Opinion of the district court 29

Final decision of the Merit Systems Protection Board 64

[pagination continues as if all were in one volume]

United States Court of Appeals
For The Eighth Circuit

No. 91-2747

Diana M. Maulding	Plaintiff/ Appellant
v.	
Louis Sullivan, Secretary [sic]	Defendant/ Appellee

Submitted: January 10, 1992

Filed: April 7, 1992

Before Arnold, Chief Judge, McMillian, Circuit Judge, and Wellford, Senior Judge (The Honorable Harry W. Wellford, Senior Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.)

Wellford, Senior Circuit Judge.

Plaintiff, Diana Maulding, filed a complaint with the Merit Systems Protection Baord (MSPB) alleging that she was constructively discharged from her agency job at the National Center for Toxicological REsearch (NCTR), Food and Drug Administration (FDA), United States

Public Health Service, based on adverse agency actions as well as charging sex and handicap discrimination. 1 The administrative law judge (ALJ) found in her favor on the handicap discrimination claim, but found for the defendant on all other claims. The agency appealed the ALJ's decision to the MSPB which reversed the rulings on handicap discrimination that were favorable to the plaintff. The district court, on appeal, affirmed and dismissed all of plaintiff's claims for relief. We AFFIRM.

The plaintiff began her employment with the Public Health Service, a divison of the Department of Health and Human Services, in 1976. From 1976 to late 1980, she worked as a chemist in a laboratory, first in the Teratology Division and then in the Chemistry

Division. She made no complaints to her superior about breathing or pulmonary problems during the time. In December, 1980, the plaintiff was reassigned to a position as a pharmacologist in the Office of Scientific Intelligence, which later became part of the Division of Comparative Toxology [sic], working in an office rather than in the laboratory.

When Dr. Lionell [sic] Poirier became Director of the Divison of Comparative Toxology [sic] in early 1987, he began undergoing a long planned reorientation from "paper" research to bench or laboratory research in the area of nutritional toxology [sic], the area in which plaintff worked. Dr. Poirier spoke with each member of his staff regarding the proposed transition to laboratory research. At that time, Maulding informed

him that she would not work in the laboratory due to a claimed allergy to certain chemicals which would be utilized in the laboratory.

In early 1988, persisting in her claims that she could not safely work in the laboratory, Maulding requested part-time work at NCTR so that she could obtain an outside position as a part-time law clerk to support herself. She reiterated her claim that health considerations precluded her from participating in lab work. In February of 1988, Dr. Poirier denied her request for part-time work. Insisting that the Division would be doing primarily lab
work, Dr. Poirier asked the plaintiff to produce specific and current information about her alleged allergies or sensitivities to various substances to

support her request to be excused from lab work. Dr. Poirier informed the plaintiff that her request would be submitted [to] and reviewed by Dr. George Smith, the agency's medical advisor, pursuant to OPM regulations.

In response to Dr. Poirier's request, the plaintiff submitted a letter from Dr. Alvin Strauss, dated April 18, 1985, recommending that she not be assigned to the lab. 2 Dr. Strauss' letter indicated that the plaintiff's "further exposure to noxious fumes" is detrimental to her heath based on adverse asthmatic reactions from Maulding's claimed exposure to phosgene some ten years earlier. Along with Dr. Strauss' letter, the plaintiff submitted copy of Dr. Poirier's request for medical documentation and a memorandum dated March 11, 1988, prepared by Dr. Poirier and

addressed to Dr. Smith, which listed the chemical compounds that might be present in the lab. A proposed position description was also presented which indicated that the plaintiff would be conducting in vitro cell culture experiments in the lab.

Dr. Smith reviewed the documents submitted by the plaintiff to ensure that (a) the diagnosis or clinical impression was justified in accordance with established diagnostic criteria; and (b) the conclusion and recommendation were not inconsistent with generally accepted medical principles and practices according to 5 CFR Sec. 339.102, the applicable regulation. On March 25, 1988, Dr. Smith wrote a memorandum to Mary Long, an employee relations specialist, FDA, stating that "without clinical records to

document the existence of a medical condition that warrants restriction from specific chemical exposure, and documentation that such exposures are likely to occur. . .," and "because no information exists that the plaintiff would be exposed to allergens in the laboratory to which she would not be exposed elsewhere, there is no medical basis upon which to recommend approval of her request."

On April 8, 1988, Dr. Poirier assigned the plaintiff to work in the laboratory. Because she did not come to work as ordered, Dr. Poirier next directed the plaintiff to report to the assigned laboratory job on April 13. On that day, she reported to NCTR for about two hours, without going to the laboratory. Dr. Poirier then charged the plaintiff with

absence without leave for two days because she did not report to the laboratory without any approved excuse for her absence. 3

Upon request, the plaintiff was granted more time to supply Dr. SMith with additional medical documentation supporting her health claims. Maulding then submitted the following additional documents: (1) copies of office records from March and April of 1988 from and Arkansas family [sic] clinic [sic]; (2) a letter, dated April 13, 1988, from Dr. Forrest B. Miller recommending that plaintiff refrain from lab work; (3) a copy of a medical record from Dr. Strauss' clinic; (4) a note to Dr. Smith from plaintiff dated April 22, 1988; (5) a copy of a page from the Dictionary of Chemical Producers showing that plaintiff's former

employer (prior to 1976) utilized phosgene; and (6) a memorandum from St. Vincent's Infirmary dated April 15, 1988. After reviewing this additional information, Dr. Smith determined that the records did not sufficiently indicate that the plaintiff had a disease of the lungs or respiratory system except for allergies that the plaintiff has had all her life. In summary, Dr. Smith concluded that Maulding failed to carry her burden of persuasion in this regard.

Dr. Poirier accordingly directed the plaintiff to report to the laboratory on May 11, 1988, and the plaintiff again refused to report for this work. Beginning May 16, 1988, the plaintiff neither reported for duty nor requested leave. On June 21, 1988, Dr. Poirier wrote to Maulding directing her to notify him by

June 28, 1988, of her intentions with respect to her assigned job. On July 15, 1988, in the absence of any response, Dr. Poirier notified the plaintiff that he proposed to remove her from federal service as a pharmacologist. Defendant asserts that Maulding was notified of her right to respond, but failed to do so. We are furnished no contrary information in this respect.

The deputy director of NCTR notified the plaintiff of her removal, effective August 27, 1988, for failure to follow a written direction and because of her absence without leave. There was no response.

On September 20, 1988, however, Maulding appealed her removal to the MSPB, alleging that the agency constructively and impermissibly discharged her. First, she

alleged that she was fired in reprisal for her "whistleblowing" activities in contesting NCTR's peer review system. 4 She also alleged that she was terminated as a result of sex discrimination and handicap discrimination. After a hearing, the ALJ reversed the agency's decision to discharge the plaintiff, determining that the agency's insistence on clinical medical evidence to support her request to be relieved of lab work was unjustified and that plaintifff's resonable fear for her health justified her absence from work. The ALJ also determined that the plaintiff was physically handicapped under the handicapped laws and that she had articulated a reasonable method of accommodating her handicap through reassignment. The AlJ rejected Maulding's allegation of reprisal because of her opposition to the peer review system, and

because she did not show that retaliation was the motivating factor for her reassignment to lab work. The AlJ also rejected the appellant's claim of sex discrimination as unsupported.

On the Agency's appeal to the MSPB, the Board reversed the ALJ finding for the agency, and against Maulding, in all respects. 5 It determined that the plaintiff's absence from duty was not justified and that the plaintiff had not met her burden under 5 CFR Sec. 339.101 to provide adequate medical documen tation that would excuse her from her assigned lab duties. The Board further found that the appellant was not
a handicapped individual under The Rehabilitation Act. 29 U.S.C. Sec. 701 et seq. The plaintiff appealed the Board's decision to the district court. Aftera

two-day trial, the district court affirmed the Board's decision. This appeal ensued.

The Board's decision on the discrimination claims before it were subject to de novo review by the district judge. The district court's findings as to claims of employment discrimination, however, are reviewed under a clearly erroneous standard. See Pullman-Standard v. Swint, 456 U.S. 273 (1982); Marafino v. St. Louis County Circuit Court, 707 F.2d 1005, 1006 (8th Cir. 1983); see also Anderson v. Bessemer City, 470 U.S. 564 (1985).

Plaintiff supplied insufficient evidence of sex discrimination under Title VII and we find no clear error in the district court's conclusion in this regard. 6 To support her claim, the plaintiff alleged that other males in her division were

liberally allowed relief from lab duties and that she was held to a more stringent standard. To support this allegation, the plaintiff showed that Greenman, a male employee, requested relief from lab work and that such relief was granted. Defendant's proof indicated, however, that Greenman based his request on a lack of ability to handle the job, not on a medical condition, and the two employees were, therefore, not similarly situated. Maulding also attempted to show that another male employee was absent without excuse and that he was not charged with AWOL as was she. That employee, however, was shown to have taken a normally scheduled day of credit leave and his absence was approved.

Maulding also fials in her claim of handicap discrimination. In order to state

a prima facie case of handicap discrimination under the Act, the plaintiff must show that she: (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. 29 U.S.C. Sec. 706(8)(B)(i) to (iii) (1988) (emphasis added). See Jasany v. United States Postal Service, 755 F.2d 1244, 1248 (6th Cir. 1985). "Major life activities" includes "breathing," and "has a record fo such impairment" means that one has a history of has been classified as having a phyusical impairment that substantially limits a major life activity. Sec. 1619.701(c)(d).

The district court found on the record that the plaintiff had "failed to

establish a sensitivity to chemicals and a history of a substantial limitation upon employability as defined in [the regulations and cases]", accepting the testimony and opinion of Dr. Smith. Dr. Smith had concluded that plaintiff had produced inadequate, recent medical history concerning her alleged condition; that her doctors' medical opinions lacked supportive clinical findings; and that there was insufficient indication of a severe respiratory problem that would be aggravated by the assigned lab work. The district court based its conclusion primarily on the premise that the plaintiff has the burden to show she is a handicapped person under the Rehabilitation Act and that because of her lack of evidence, she has fialed in that burden. See Jasany, 755 F.2d at 1248 (plaintiff's burden to show handicap). The

court further pointed out that cases in which handicaps were established, the plaintiffs all supported their allegations with adequate medical documentation. See Norcrossv. Snead, 755 F.2d 113 (8th Cir. 1985) (evidence shown to establish blindness); Harrison v. Marsh, 691 F. Supp. 1223 (W.D. Mo. 1988) (evidence produced to demonstrate muscle damage); Dept, of the Army v. Rhone, 665 F. Supp. 734 (E.D. Mo. 1987) (evidence produced to show history of sarcoidoisis (pulmonary disease)).

The district court held that even if the plaintiff were a handicapped person under the statute, she could not show that her sensitivity to chemicals substantially limits her major life activities. We find no error in its conclusion that her ailment would prevent her only from lab

work, and that such a limitation does not substantially limit her employment as a whole. See Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986) ("an employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job."); Jasany, 755 F.2d at 1248-1249 (major life activity not substantially limited when impairment interferes with performance of one particular job). We agree with the reasoning of the district court and find that it was not error to reject the plaintiff's claim of handicap discrimination on the basis of failure to carry the burden or proof in this regard.

In regard to the standard of review for the nondiscriminatory adverse agency actions, the same standard is employed at

both the trial and the appellate levels. We accord the district court's decison "no particular deference." First National Bank of Fayetteville, v. Smith, 508 F.2d 1371, 1374 (8th Cir. 1974), cert. den. 421 U.S. 930 (1975); see also Lockhart v. Knops, 927 F.2d 1028, 1032 (8th Cir. [date missing]), cert. den., 112 S. Ct. 186 (1991); Brown v. United States dept. of Interior, 679 F.2d 747, 749 (8th Cir. 1982). "The scope of judcial review of decisions by the [MSPB] is limited to ensuring that required procedures have been followed and that the action taken was not arbitrary or capricious." Grasso v. IRS, 657 F.2d 224, 225 (8th Cir. 1981). To be sustained, the agency decision need only have had a rational basis in law. Id.; see also Hurley v. United States, 575 F.2d 792, 793 (10th Cir. 1978); 5 U.S.C. Sec. 7703(c) (1988). 7

With respect to Maulding's nondiscrimination claims (whistle-blowing, harassment and procedurel deficiencies) we find that the Board's decision was not arbitrary nor capricious. We agree with the district court that "the decision of the Board was supported by substantial evidence. It is clear that the Board's decision was neither arbitrary nor capricious nor an abuse of discretion." 8

Although given sufficient opportunity, Maulding provided inadequate medical evidence to justify being excused from lab duty. Dr. Smith reviewed the medical documentation according to 5 C.F.R. Sec. 339.101 which requires that "the diagnosis or clinical impression is justified in accordance with established diagnostic criteria." Maulding failed to demonstrate

that his conclusions and recommendations were "inconsistent with generally accepted medical principles and practice." After concluding that her initial submission of medical information was inadequate, Dr. Smith gave the plaintiff extra time to supplement her documentation.

The record and briefs show and the district court found that, in total, the plaintiff submitted statements of two doctors that she refrain from lab work, based on some work documentatiion, some clinical evidence, and a memorandum of her reported history of chemical expousre. Her clinical work showed that her x-rays were normal, and her pulmonary function studies did not require restrictions to her chemical exposure. 9 Her doctors' letters contained statements that the plaintiff should refrain from working in the lab,

based primarily on her own information, fears, and subjective concerns. Neither was supported by sufficient records, treatment plans, or other corroborating evidence.

Dr. Smith concluded that the letters and other documentation were inadequate as a medical basis upon which he could conclude that there was a serious health risk involved in the assigned lab work. He had given the plaintiff a list of chemicals to which she would be exposed in the lab, and no doctor made specific findings that those certain chemicals would harm the plaintiff.

WE find no error in the Board's conclusion, and the district court's conclusion, that plaintiff showed no serious risk of harm that would result

from exposure to the chimcial agents utilized in the laboratory. We note that at a time closer to her alleged exposure to phosgene over a period of years through 1980, plaintiff had worked without complaint. Maulding now harbors genuine fears and concerns about respiratory problems, and that she was presented with some difficulties by reason of passage of time in obtaining medical proof. It is regrettable that the agency, for whatever reasons, could find no basis to accommodate the wishes and concerns of this experienced employee. She has demonstrated energy, intelligence, and persistence in pursing her claims before the administrative agencies and the court, unfortunately to no avail. We are sympathetic to her contention that her doctors did not know how to test her chemical aversions and that defendant was

obdurate in insisting upon data available only from limited sources. These acknowledged concerns on our part do not overcome plaintiff's failure on this record to carry her burden of demonstrating handicap, disability, or justified health concerns that would preclude at lease an effort to report for, and to attempt to perform, her assigned work.

Although the issues were close, for the reasons indicated, we affirm the decision of the district court.

A true copy. Attest: Clerk, U.S. Court of Appeals, Eighth Circuit.

footnotes

1 Maulding is now a lawyer and is proceeding pro se.

2 Dr. Struass was deceased at the time Dr. Poirier requested medical documentation. The three-year-old letter from Dr. Strauss was not accompanied by any documentary explanation for his recommendation.

3 On April 11, 1988, the plaintiff telephoned Dr. Smith and asked him to "rescind" his memorandum rejecting her requsts until she could present more medical documentation. Dr. Smith informed the plaintiff that he could not rescind his memorandum and suggested to her that she request relief from her supervisor. The plaintiff wrote to Dr. Poirier on April 13, 1988, requesting time to submit additional medical documentation to Dr. Smith. This request was granted.

4 In May 1987 the NCTR issued a guide or peer evaluation plan called "The Evaluation Plan for Support/Service Scientist Postions at NCTR." The guide provided for panels to review information regarding qualifications and classifications of non-research scientists. The plaintiff stated her opposition to the guide at an NCTR meeting in May, 1987. On July 10, 1987, the plaintiff wrote to the deputy regional director for the Office of Personnel Management (OPM) objecting to the guide as being illegal. On July 29, 1987, the OPM responded that the guide was consistent with the Classification Act and that the OPM would not intervene in the review of support scientist positions at NCTR.

5 Maulding filed no cross appeal or protective appeal to MSPB from denial of

her retaliation and sex discrimination claims.

6 We note also that plaintiff did not effect a timely appeal from the adverse determination by the AlJ of her sex discrimination claim. The same procedural deficiency applies to her "whistle-blowing" or retaliation claim which the AlJ found to be unsubstantiated.

7 5 U.S.C. Sec. 7703(c) (1988) provides:

[T]he court shall review the record and hold unlwful and set aside any agency action, findings, or conclusions found to be--

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence.

8 The plaintiff did not petition for review of the ALJ's findings with respect to her claim of reprisal with the MSPB. See MSPB Order at p.3 n.2. The plaintiff, furthermore, submitted no tenable evidence to support this allegation.

9 The plaintiff claims that Phosgene, a chemical to which she was exposed on the early 1970's, does not show up on a pulmonary examination. There is no evidence, however, that phosgene is one of the chemicals to be used in the lab.

IN THE UNITED STAES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

DIANA M. MAULDING PLAINTIFF

v. No. LR-C-90-42

Louis W. Sullivan, Secretary,
Department of Health & Human
Services, et al DEFENDANTS

Memorandum Opinion

Plaintiff was removed from her position as GS-405-11 pharmacologist in the Division of Comparative Toxicology at the National Center for Toxicological Research (NCTR or Agency) Food and Drug Administration, Public Health Service, Department of Health and Human Service, in August, 1987. The Agency contends that she was absent without leave from May 16, 1988 to July 15, 1988, and that she failed to follow her supervisor's written instruction to return to work or to inform him of her intentions regarding her position with the Agency. Plaintiff appealed her removal to

the Merit Systems Protection Board (MSPB or Board), claiming that she had been justified in being AWOL because she feared reporting to the laboratory, as directed, would endanger her health. She also contended the Agency's determination that she had failed to present adequate medical evidence to support her request to be reliefed of her laboratory duties and claimed that the Agency's removal action was taken in reprisal for her "whistle-blowing" activities. The Board ultimately sustained the Agency's removal action.

Plaintiff is now before this Court appealing the Board's affirmance of her removal. In addition she is claiming that she was discriminated against because of her sex and an alleged handicapping condition. Moreover, she claims that the defendants have violated her rights under

the Privacy Act by revealing her leave status to a caller in the summoer of 1988 without permission. She also claims that the defendants violated the Privacy Act by demanding protected information from her in the context of the peer review policy adopted by the Agency.

Plaintiff's non-discriminatory claim

We will first deal with the non-discriminatory claim of the plaintiff--that plaintiff's conduct did not justify her removal from federal service and that the true reason for her removal was her "whiltleblowing" concerning the "peer review" program instituted at the agency. These claims were the subject of a hearing before and administrative law judge (ALJ). The latter decided in plaintiff's favor, but on appeal to the Merit Systems

Protective [sic] Board the ALJ was reversed and plaintiff's removal from federal service was upheld. My review of the Board's decison is extremely limited. It is restricted to a determination of whether the decision of the Board is supported by substantial evidence and whether it is arbitrary, capricious and an abuse of discretion or otherwise not in accordance with law. 5 U.S.C. Sec. 7703(c).

Both parties concede that this is the standard of review for the non-discriminatory claims. Although the Board found that the handicap and sex discrimination claims were without merit, the parties agree that my review of these claims is de novo. Hayes v. united States Government Printing Office, 684 F.2d 137, 139-140 (D.C. Cir. 1982). See also Romin

v. Shear, 799 F.2d 146 (9th Cir. 1986), cert. denied, 481 U.S. 1050 (1987); Rana v. United States, 812 F.2d 887(4th Cir. 1987); Barnes v. Small, 840 F.2d 972 (D.C. Cir. 1988).

Plaintiff was absent without approved leave from May 15 to July 15, 1988, and disregarded orders to return to work. The crux of the plaintiff's dispute with the Agency is that her alleged sensitivity to chemicals warranted her AWOL status. The MSPB determined that the plaintiff had failed to support this allegation by proving that she was medically restricted from lab work. The Board found that her medical documentation was inadequate because it was based principally on her own subjective statements and medical reports from two doctors who based their reports on the same subjective statements

rather than on objective findings. The Board relied on 5 CFR Part 339 as furnishing a standard for medical documentation in the context. Part 339 appears in the record as Defendant's Exhibit 38.

Neither doctor indicated the medical basis for his recommendation or that he had ever been consulted by or had examined or treated the plaintiff for exposure to the chemicals with which plaintiff would be required to work. Other clinical records submitted by plaintiff did not indicate that she needed to be restricted from lab work. Her chest x rays were normal. Her pulmonary function studies were negative for any requirement for restrictions to chemical exposure (Administrative Hearing Record: JtX 131-134, 147-263, 474-496).

The medical and clinical evidence submitted by plaintiff was evaluated by Dr. George H. Smith at the Board hearing and in the trial before his court. His curriculum vitae appears as Defend' [sic] Exhibit 37. The substance of his testimony before the Board appears in Defendant's exhibits 38-47. Dr. Smith's company, G.M. Smith Associates, Inc. is under contract with the Agency to evaluate such medical problems as presented by the plaintiff in this case. His evaluation is summarized in two memos. The first dated August 2, 1987, appears as Defendant's Exhibit 39 and reads as follows:

As you requested I have reviewed the medical documentation submitted by Ms. Maulding in support of excusal of her absence:
-a letter addressed "To whom it may concern" dated April 3, 1987 [sic] and signed by Alvin W. Strauss, Jr., M.D.
No copies of medical office or hospital records were received.
Although Dr. Strauss' letter indicates

that, because Ms. Maulding was exposed to Phosgene [sic] approximately ten years ago, "further exposure to noxious fumes triggers an asthmatic reaction in the patient." However, no reference is made regarding the circumstances under which she has experienced such reactions, the frequency with which they have occurred, the severity and duration of the reactions or the specific substances that have caused the reactions. Without clinical records providing information to this degree of specificity, there is no medical basis upon which to conclude that there is any risk-avoiding or therapeutic value in restricting Ms. Maulding from "laboratory related work" or from any particular laboratory environment at NCTR.

After the intiial evaluation by Dr. Smith, plaintiff submitted statements concerning her exposure to Phosgene while employed at the Rebuke [sic] Company in Louisiana, December 1974. In addition, she related chemical burns sustained while she was in college which necessitated a visit to the emergency room of a Little Rock hospital. Records of this visit were not available.

Plaintiff further related that in approximately 1976 she was working with an

octanol isomer. She dropped in the sink and leaned over to retrieve an item that also fell into the sink and breathed a lung full. It felt as though she had been hit with a hammer in the chest.

In addition to this information provided by the plaintiff, Dr. Lionel Poirier, Director, Division of Comparative Toxicology, provided Dr. Smith with a list of the chemicals to ehich plaintiff would be exposed in the lab. Plaintiff also submitted to Dr. Smith the results of a physical examination at the Family Clinic, Little Rock, Arkansas (DX 46).

Dr. Smith summarized his evalauation of the new data submitted by plaintiff in Defendant's Exhibit 47:

Accordingly, in the absence of clinical records to document the existence of a

medical condition that warrants restriction from specific chemical exposures or documentation that she would be likely to be subject to exposures generally known to be of a hazardous nature in the laboratory to which she would be assigned, there is no medical basis upon which to conclude that there is risk-avoiding to therapeutic value attached to restricting Ms. Maulding from such an assignment. Moreover there is no information to support a conclusion that she would be exposed to allergens in the laboratory to which she would not be exposed elsewhere or that she is likely to suffer injjury or harm by working in the laboratory. As a consequence, therefore, there is no medical basis upon which to reconside rthe reocmmendations of my previous memo or to now recommend approval of her request.

The administrative record on behalf of the agency consisted of primarily of the testimony of Dr. Smith (JtX 229-291) and Dr. Lionel Poirier, Director of the Division of Comparative Toxicology (JtX 293-329). Dr. Poirier came to the NCTR in June of 1987. The mission of the Center had changed, and this division was moved into the field of nutritional toxicology. In accordance with the mission change, Dr.

Poirier felt that it was essential that personnel in his division be committed to lab work. When he spoke to the plaintiff about this shift in the role of the division, she objected to wrking in the lab. (JX 1, p. 294) because of allergies. He asked for documentation to be submitted to Dr. Smith. He provided a list of the chemicals to which she would be exposed, along with a group of pictures which showed the lab environment in which plaintiff would be working. These pictures appear in the record before me as Defendant's Exhibits 9-17 to the testimony of Dr. Poirier. Dr. Poirier declined to change plaintiff's lab assignment on the basis of Dr. Smith's original assessment. In a memo dated April, 1988 he directed her to commence studies in the lab on April 11. He testified as follows;

Q. And why are you directing her at that time?

A. Because on the basis of the information that I received from Doctor Smith there was no basis for medical exclusion. The rest of the laboratory, the rest of the indivduals within the laboratory had gone into the laboratory at that time. She was the only one who was not working in the laboratory environment with the exception of the secretary and I could not give her grounds for exclusion with the memo provided by Doctor Smith.

Plaintiff did not report on April 11, 1988 but on April 13 she requested time to submit additional documentation to Dr. Smith (JX 1, p. 313). Dr. Poirier granted her an 11-day extension to furnish further information to Dr. Smith. During this time she was to read literature on her lab

work. (Id.) After Dr. Poirier received Dr. Smith's second assessement, which is summarized, supra, he again ordered her to report to the lab at 8:00 a.m. on May 11 (JtX 1, p. 315; Px27). She did not report in response to this directive (DX 28). Beginning Monday, May 16, the plaintiff did not report to the Agency or equest leave (DX 34). Dr. Poirier by letter dated June 21, 1988 requested a statement of new intentions (DX 320. On July 15 he advised her by letter that the proposed to remove her from federal service. His charges and specifications were as follows:

The charge of Failure to Follow Written Directions is based on the following specification:
In my June 21, 1988 letter, I directed you to either return to work immediately or notify me by June 28, 1988 of your intention regarding your employment. I also stated that if you failed to contact me or report to work by June 29, 1988 I would initiate action to remove you from the Federal service.
As of the date of this notice you have not

reported for work or made any personal contact with me.
Your failure to comply with my written directions is unacceptable conduct, has hampered the work of this division, and cannot be tolerated. You were clearly warned in the June 21, 1988 letter that failure to comply with my directions would result in initiation of removal proceedings.
The charge of Absence Without Leave (AWOL) is based on the following specification: Since May 16, 1988, through the date of this notice, you have been continuously AWOL for a total of 360 hours.

Plaintiff was actually removed from fedral service by Mr. Arthur Morris, Deputy Director of the NCTR. He testified that she was removed because he was concerned "about getting the job done within Dr. Poireir's division. That for the efficiency of the service, we would have difficulty continuing in the light of that kind of behavior." (JX 1, p. 334). Morris denied that the plaintiff's expressed opposition to the peer review system had any part in the decision to remove her. (JX1, p. 335).

In her testimony at the administrative hearing, plaintiff testified about being exposed in December 1974 to phosgene while working for Rubicon in Louisiana (JX1,pp. 353-355). She also testified about becoming symptomatic when exposed to octanol at NCTR (Id. 355-357). She also testified about becoming symptomatic when exposed to octanol at NCTR (Id. at 357). The exposure occurred while she was working at the Agency from 1976-1980. She was unable to secure medical records on the Louisiana exposure but testified that she consulted Dr. Alvin Strauss, now deceased, about the allergic reactions to the octanol and acetone. His report is in the record and has been alluded to supra. She testified that she consulted Dr. Strauss soon after moving from Louisiana,

which would have been in 1976. (Id. at 357).

Plaintiff testified that she opposed the peer review system and had spoken out at a meeting held on May 13, 1987. She claims that her opposition to the peer review system and her contention that it did not have the required approval of the Office of Personnel Management (OPM) was a factor in her discharge (Id. at 361). This contention was rejected by the ALJ in the initial administrative hearing on Plaintiff's attack of her discharge. On this issue the ALJ was summarily affirmed by the MSPB. (Id. at 609). I agree with the findings and conclusions of the ALJ with regard to the repirsal issue. His [sic] findings and conclusions are set out on pages 557-59 of the record of the administrative hearing. I adopt these

findings and conclusions of law as my own. They were supported by substantial evidence and are not arbitrary, capricious or an abuse of discretion.

The above is a brief summary of the evidence adduced at the administrative hearing. A careful examination of that evidence demonstrates conclusively that the decision of the Merit Systems Protection Board was supported by substantial evidence. It is clear that the Board's decision was neither arbitrary nor capricious nor an abuse of discretion. Plaintiff's non-discriminatory claims must therefore be denied and dismissed. The plaintiff's claim of discrimination will now be considered.

Plaintiff's claim of sex discrimination

Plaintiff's claim of sex discrimination was considered by the administrative law judge and denied (Id. at 559-560). The MSPB affirmed on this issue (Id. at 609). However, the plaintiff is entitled to a trial de novo on the sex discrimination claim.

On the basis of the exhibits and the evidence adduced in the trial before me, I make the following findings of fact.

1. Plaintiff was a member of protected class.

2. She has failed to support her contention that she was treated differently from male employees with regard to leave. Plaintiff alleges that she took eight hours of credit leave on April 11, 1988 without prior approval and was charged AWOL. She states a male staffer took leave without prior approval

on April 15, 1988 and was not charged with AWOL. Plaintiff, however, was taking leave not previously scheduled while the male staffer was taking his normally scheduled day of credit leave and the Agency was already aware he would be absent on that day. Plaintiff also charges that she was charged with AWOL for taking sick leave on April 13 and "other staffers" were not. Plaintiff, however, has failed to prove that male staffers took sick leave without prior approval.

3. Plaintiff claims that a male colleague at his request was not assigned to the lab. However, his situtation is not analogous to that of the plaintiff. Dr. Greenman, a GS-14 senior researcher, was detailed to a position in Dr. Alaben's office in 1989. That position arose because the agency received a directive to complete some studies and was not in

existence in 1988 when plaintiff was removed for her position.

4. All employees in the Division of Comprative Toxicology were offered an opportunity to indicate in what area of nutritional toxicology they were interested in working. Only the plaintiff refused to indicate an area of interest.

5. The plaintiff was a GS-11. The males in her division were GS-13 or GS-14 senior researchers.

6. With regard to the sex discrimination claim, I have applied the formula approved by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). I find that plaintiff has not even made a prima facie case. Assuming she has made such a case, I find that the agency has advanced a legitimate, non-pretextual reason for its personnel actions. Plaintiff has shown no intention on the

part of the defendant to discriminate on the basis of sex and on the whole has failed to sustain her burden of proving sexual discrimination.

Plaintiff's claim of handicap discrimination

Findings of Fact and Concclusions of Law

1. Plaintiff began her employment as a GS-5 chemist at the National Center for Toxicological Research, NCTR, in January, 1976. NCTR is a component of the Food and Drag and Administation, United States Public Health Service, Department of Health and Human Services.

2. From 1976 to late 1980, she worked as a chemist in the laboratory, first in the Teratology division and then in the Chemistry division. She was exposed to solvents on a daily basis. She did not report to her supervisor that she had

experienced any breathing problems from exposure to solvents. She was reassigned from the laboratory in 1980 not beause of a sensitivity problem but because of a disput with her supervisor.

3. Under 29 C.F.R. Sec. 1613.702(a), a handicapped person is defined as one who

(1) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.

4. "Physical or mental impairment" means (1) any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs' [sic] cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities.

29 C.F.R. Sec. 1613.701(b).

5. "Major life activities" means functions, such as caring for one's self, performing manual tasks, walking, seeing,

hearing, speaking, breathing, learning and working. 29 C.F.R. Sec. 1613.702(c).

6. "Has a record of such impairment" means has a history of, or has been classified (or misclassified) as having a mental or physical impairment that substantially limits one or more of major life activities. 29 C.F.R. Sec. 1613.7029d).

7. Under the Rehabilitation Act, the burden is on plaintiff to establish existence of an impairment that substantially limits a major life activity as an element of plaintiff's prima facie case. Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985).

8. The question of whether a person is a handicapped individual authorized to claim relief from discrimination in employment under the Rehabilitation Act centers upon whether the person can establish that he or she has a particular impairment and

whether this impairment constitutes for that particular person a significant barrier to employment. Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986).

9. If an employee establishes that he or she is a "handicapped individual," the employee must then show that he or she is a "qualified handicapped person."

10. "Qualified handicapped person" means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential function of the position in question. 29 C.F.R. Sec. 1613.703(f).

11. I find that plaintiff has failed to establish a sensitivity to chemicals and a history of a substantial limitation upon employability as definded in the above cited federal regulations and cases. In this regard I accept the testimony of Dr. George Smith.

12. I find that she is not a handicapped person within the meaning of 29 C.F.R. SEc. 1613.702(a), supra.

13. To succeed in her claim of handicap discrimination, the plaintiff must first establish that she is an handicapped person within the protection of the Rehabilitation Act. 29 U.S.C. Sec. 791, et seq., Jasany v. United States Postal Service, supra. This she has failed to do.

14. To succeed on her claim of handicap discrimination with respect to her employment at NCTR, plaintiff has the burden of establishing that she is a handicapped person as those terms are defined by the Rehabilitation Act of 1973, as amended, 29 U.S.C. Sec. 701 et seq.

15. As shown in the administrative record, plaintiff cannot meet her threshold burden of establishing that she is an handicapped person. She did not present any documen-

tation to the agency demonstrating that she had a medical condition or a history of a medical condition which caused her significant breathing problems.

16. Where the courts in this Circuit have found an individual to be handicapped, the plaintiff has provided medical documentation to the agency demonstrating that she had a medical condition or a history of a medical condition which cuased her significant breathing problems.

16. Where the courts in this Circuit have found an individual to be handicapped, the plaintiff has provided medical documentation to support that he or she has a handicapping condition. See Norcross v. Snead, 755 F.2d 113 (8th Cir. 1985) (plaintiff presented evidence to establish that she was legally blind); Harrison v. March, 691 F. Supp. 1223, 1229 (W.D. Mo. 1988) (plaintiff presented medical

evidence to demonstrate cancer operation had resulted in severe damage to muscles in arm and shoulder area); Department of Army v. Rhone, 665 F. Supp. 734, 742 (E.D. Mo. 1987) (plaintiff had a documented history of sarcoidosis, a disease affecting the lymphatic, pulmonary and ocular systems).

17. Even if plaintif did present medical evidence to establish an alleged chemical sensitivity, such a condition would not make her a handicapped individual subject to the protection of the Rehabilitation Act. According to the plaintiff, this condition merely prevents her from working in the laboratory. The fact that an individual cannnot perform one particular job, however, does not pose a substanital limitation on employment making that person a handicapped person for the purposes of the Rehabilitation Act.

Forrisi v. Bowen, 794 F.2d 931 (4thCir. 1986); Jasany v. United States Postal Service, 755 F.2d 165 (6th Cir. 1985).

18. Plaintiff is unable to meet the burden of establishing that she is an handicapped person because she cannot establish that she has an impairment or that this impairment has substantially limited her major life activities.

The claim of a Privacy Act violation Finding of Fact and conclusions of law

Plaintiff contends that the Privacy Act was violated. 5 U.S.C. Sec. 552(a) [sic]. She alleges in Count III that as a part of the peer review process, she was required to submit information from her official personnel folder to the peer review panel. She contends that the panel should not have had access to this information under

the Privacy Act. In Count IV of her complaint, she alleges that an employee of the Agency (Dr. Poirier) informed a telephone caller that she was AWOL, thereby violating the Privacy Act. With regard to the Privacy Act claim, I make the following findings of fact and conclusions of law. The first two findings of fact were stiputlated by the parties.

1. In late May or early June, 1988, Dr. Poirier received a telephone call asking if the plaintiff worked in the division of comparative toxicology and if he was her supervisor.

2. Dr. Poirier responded that she did work at NCTR, but was AWOL.

3. The Privacy Act, 5 U.S.C. Sec. 552a, governs conditions for disclosure by an agency or its personnel of certain types of records contained within designated

systems of records maintained by the federal government. 5 U.S.C. Sec. 552a(b).

4. The purpose of the Privacy Act is to preclude these systems of records from being used as a source of personal information about an individual without that individual's prior consent. Olberding v. United States Department of Defense, 709 F.2d 621, 622 (8th Cir. 1983).

5. Only disclosure by the agency or its personnel is actionable. Id.

6. The only disclosure by an agency from a designated system of records which is actionable under the Privacy Act is "one resulting from the retrieval of information initially and directly from records contained in a system of records. . ." Id.

7. An agency may disclose a record from a system of records it maintains, without the individual's prior consent, to those

officers and employees within the agency who have a need for the record in the performance of thier duties. 5 U.S.C. 552a(b)(1).

8. I find no violation of the Privacy Act. It was the plaintiff herself who obtained information from her official personnel file and furnished it to the peer review panel. No member of the peer review committee had access to the plaintiff's personnel file.

9. The information furnished by Dr. Poirier did not violate the Privacy Act. In the first place, it was true and accurate and was information Dr. Poirier was entitled to disclose. The distinction between information retrieved from a system of records and independently acquired has long been recognized under the Privacy Act. Olberding v. Department of Defense, 709 F.2d 621, 622 (8th Cir.

1983); Doyle v. Behan, 670 F.2d 535, 539 (5th Cir. 198?); Jackson v. Veterans Adminstration, 503 F. Supp. 653, 655-57 (N.D. Ill. 1980); Savarese v. U. S. Dept. of Health, Education & Welfare, 479 F. Supp. 304, 307-308. aff'd. 620 F.2d 298(5th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); Thomas v. Department of energy, 719 F.2d 342 (10th Cir. 1983). The disclosure of information derived from an independent source is not prohibited by the statute even though identical information may be contained in an agency system of records. Thomas v. U.S. Department of Energy, 719 F.2d 342 (10th Cir. 1983); Jackson v. Veterans Administration, 503 F. Supp. at 656.

10. In Thomas v. Department of Energy, supra, a supervisor called a meeting to advise employees that their fellow employee, the plaintiff, was to undergo a

psychiatric examination. Based on this disclosure, the plaintiff filed suit under the Privacy Act. The court determined, however, the supervisor did not learn of this information from a system of records but from other sources and dismissed the plaintiff's complaint. The Olberding court stated:

> The interpretation contended for by the plaintiff-that Section 552a(b) is violated if agency personnel disclose information they possess by means other than retrieval from a system of records if they know or have reasonable grounds to know that the information may also be found in a record contained in a system of records-would create an intolerable burden and would expand the Privacy Act beyond its purpose, which is to preclude a system of records from serving as the source of personal information about a person that is then disclosed without that person's prior consent.

Olberding v. Department of Defense, 709 F.2d at 622.

11. Dr. Poirier, as plaintiff's supervisor, was aware of her leave status. It

is obvious from his meorandum concerning the telephone call that he did not go to a system of record to retrieve this information. Plaintiff, therefore, has no cause of action on this allegation under the Privacy Act.

Conclusion

As noted, supra, the review of plaintiff's non-discriminatory claims is very limited. Although the issues before the Merit System Review Board [sic] with regard to the non-discriminatory claim was somewhat close, there was abundant evidence in the record to support the Board's decison. I find no basis for finding that the Board's decision, which is attached hereto as Exhibit A, was arbitrary, capricious or an abuse of discretion. I have tried the claims of plaintiff for sex discrimination

adn handicap discrimination and the Privacy Act claim de novo. Based on the evidence adduced at the trial, I find these claims to be without merit. The case was well tried and fully developed by the capable attorneys. The court appreciates the cooperation with the court and with each other in the presentation of this matter.

Dated this 1st day of July, 1991.

Henry Woods, U.S. Dist. Judge

UNITED STATES OF AMERICA
MERIT SYSTEM PROTECTION BOARD

DIANA M. MAULDING APPELLANT

v. No. DA07528810647

DEPARTMENT OF
HEALTH & HUMAN SERVICES AGENCY

Date: December 18, 1989

Gary Green, Esq., North Little Rock, Arkansas for the appellant

Mary Mitchell Armstrong, Esq., Washington, D.C. for the agency

before: Daniel R. Levinson, Chairman, Maria L. Johnson, Vice Chairman, Samuel W. Bogley, Member

Opinion and order

This case is before the Board upon the agency's petition for review of the January 18, 1989, initial decision, which reversed its action removing the appellant from her position. For the reasons discussed below, the Board grants the agency's petition for review under 5 U.S.C. Sec. 7701(e)(1), affirms the initial decision in its finding that the

appellant failed to show reprisal and discrimination based on sex, reverses the initial decision in its finding that the agency's charges were not sustained and that the appellant established discrimination based on physical handicap, and sustains the appellant's removal.

Background

The agency removed the appellant from her position as pharmacologist based on the charges of failure to follow written instructions and absence without leave (AWOL). See Initial Appeal File, Tab 6, Subtab 34. The charges arose out of the appellant's failure to report for duty in the agency's laboratory (lab) based on her asserted sensitivity to chemicals in the lab, 1 her failure to notify ther supervisor, as requested, of her

intentions regarding her position with the agency, and her unauthorized absence from work from May 16, 1988, until July 15, 1988, the date of the notice of proposed removal. Id at Subtab. 33. The appellant appealed her removal to the Dallas Regional Office of the Board, disputing the charges and raising the affirmative defenses of reprisal for having engaged in alleged protected activities and discrimination based on sex and physical handicap. Id. at tabs 1, 16.

The administrative judge found the agency action not sustained. She found that the appellant properly refused to follow her supervisor's instructions to report to work because her uncontradicted testimony established that she experienced severe respiratory difficulties when exposed to chemicals in the lab. The administrative

judge also found that the agency unreasonably refused to accept the supporting medical documentation the appellant presented.

As to the appellant's affirmative defenses, the administrative judge found that she did not establish reprisal because her opposition to a peer review system, on which she based her repirsal claim, was ot a protected activity under 5 U.S.C. Sec. 2302(b)(8) or Sec. 2303(b)(9). The administrative judge further found that, even if the appellant had shown that she had engaged in a protected activity, she did not show that retaliation was the motivating factor for her reassignment ot lab work. The administrative judge also found that the appellant failed to show sex discrimination because, although she showed that she was a member of a

protected group, she did not present evidence sufficient to show that she was denied leave while male employees similarly situated were granted leave.2

The administrative judge found, however, that the agency discriminated against the appellant based on her physically handicapping condition. In this regard, the administrative judge found that the appellant was a physically handicapped person under 29 C.f.R. Sec. 1613.702(a) because her sensitivity to organic chemicals limited her ability to work. She found that the appellant had identified two positions for which she believed she might have been qualified, and that, although the agency's personnel specialist testified that none of those positions existed at the time of the hearing, the agency did not meet its obligation to

search for a suitable vacancy for the appellant.

In its petition for review, the agency contends, inter alia, that: (1) In accepting as sufficient the appellant's evidence as to her inability to perform, the administrative judge ignored 5 C.F.R.part 339, which places upon the employee the burden of establishing that she was medically restricted in the performance of her duties; (2) the appellant improperly refused the order to report to the lab; and (3) the appellant is not a qualified handicapped individual.

The appellant has responded to the petition for review, asserting the correctness of the initial decision.

Analysis

The appellant did not sustain her burden of proving that she was medically restricted from performing lab work, and accordingly, the agency charges are sustained.

5 C.F.R.part 339 sets forth those circumstances in which an agency may require or offer a medical examination and the procedures for doing so. The applicable regulation, 5 C.F.R. Sec. 339.301(d), provides in pertinent part as follows:

An agency may offer a medical examination when an individual has made a request for medical reasons for a change in duty status, assignment, or working conditions or any other benefit or special treatment . . . and the agency, after it has received and reviewed medical documentation, determines that it cannot

grant, support, or act further on the request without verification of the clinical findings and current clinical status.

This regulation places the burden on the employee to support, with medical evidence, a request for special treatment based on medical reasons. While the regulation permits an agency to offer a medical examination if the employee does not meet this burden, it does not "require" the agency to do so.3

The agency contends that, in finding that the appellant established that she had a medical limitation, the administrative judge erroneously accepted her statement of sensitivity as constituting adequate medical evidence. The agency asserts that, in doing so, the administrative judge apparently relied on the fact that the appellant was unable to obtain the medical records of treatment she allegedly

received for chemical sensitivity, as well as on the testimony of the agency's medical advisor, Dr. George Smith, that he was aware of only one doctor in the country who could peform the required clinical work to test for a sensitivity such as the appellant's. See Petition for Review (PFR) File, Tab 1, PFR at 14 & n.4. The agency further contends that the administrative judge erred in stating that the agency required the appellant to submit clinical documentation only and that the agency, in fact, requested a range of medical evidence, including clinical findings. Id. at 14 n.3. The agency alleges that the appellant did not attempt to locate records of her alleged treatment in the 1970s for chemical sensitivity, and that, although she testified that she could not locate medical records form her present

physician, there was no indication from the physician that such records ever existed. The agency notes that there was no evidence that the appellant advised the agency of health concerns while working in an agency lab from 1976-1980, and that the appellant was reassigned from that lab in 1980 because of difficulties with her supervisor, and not because of medical problems. Id. at 14 n.4.

The administrative judge found, based on the appellant's uncontradicted testimony, that she had a sensitivity to chemicals. The administrative judge considered letters written by two of the appellant's physicians, Drs. Alvin W. Strauss, Jr., and Forrest B. Miller. Dr. Strauss recommended that the appellant refrain from lab work because of her previous reaction to chemicals. See IAF at Tab 6,

Subtab 1. Dr. Strauss's letter related the appellant's history with respect to her exposure to chemicals. His letter was not, however, based on his own examin- ation of the appellant. Dr. Miller also recommended against the appellant's exposure to organic solvents. While Dr. Miller treated the appellant for "severe rhinitis, conjunctivitis and bronchitis," and stated that she was sensitive to organic solvents, he did not treat her for reactions to those solvents. Id. at Subtab 13.

The agency's medical advisor, Dr. Smith, noted, however, that clincial records submitted by the appellant did not show that she should be restricted from lab work. He noted that there was "no data to verify the frequency or intensity of the exposure to which" the appellant had been

subjected in her prior employment, during which she alleged she became aware of her sinsitivity, and that there were "no abnormal clinical findings." Id. at Subtab 20. Dr. Smith also noted that x-rays taken on March 8, 1988, when Dr. Miller saw the appellant, were normal. Dr. Smith furthe pointed out that, although an April 19, 1988, clinical note from the Strauss Clinic "confirm[ed] Ms. Maulding's concern about having a reaction to chemicals," a clinical examination of the same date was negative in regard to any requirement or restriction to chemical exposure. Id. See also IAF at Tab 20.

With regard ot the issue of whether there was an available testing procedure to confirm the appellant's condition, Dr. Strauss stated that he was not aware of anyone who performed "routine pulmonary

function challenges using potentially toxic chemicals" and that, while there were routine tests to induce asthma, use of such toxic chemicals for this purpose would create "some risk " Id., Appellant Exhibit X. He also stated that significant "inhalation of organic solvents to test their effects on pulmonary function . . . would increase risk of pulmonary damage." Id., Appellant's Exhibit Y. Further, Dr. Smith testified that he knw only one doctor nationwide, in Denver, Colorado, who administered chemical sensitivity testing. See Initial Decision at 5-6.

However, in a September 30, 1988 letter, Dr. Jerry Heron, who reviewed the appellant's medical records at the request of Dr. Miller, stated that pulmonary studies perfomed on the appellant on April 13, 1988, "demonstrated normal expiratory

flow rates." Id., Appellant's Exhibit Z. He suggeted "a methacholine challenge test." which, if positive, would have indicated sensitivity "in less than toxic exposures" and would have requried no further "specific testing for chemical reactivity or hypersensitivity." Id. He noted that only if the methacholine challenge test was negative would the appellant's doctors "be faced with the difficult task of proving the presence of a chemical irritant." Id. Dr. Heron did not indicate whether any risks were involved in a methacholine challenge test, and there is no evidence of record to support a finding that the test is dangerous.

We find that the evidence presented by the appellant consisted mostly of her own subjective reports of sensitivity to

chemicals. The medical evidence presented relied on the appellant's own statements of chemical sensitivity or related to other medical problems not germane to such sensitivity. While we agree with the administrative judge that the agency's medical adivorsor should have informed the appellant of the only medical doctor he knew nationwide who performed chemical sensitivity tests, we find that the appellant could have obtianed clinical evidence if she had submitted to a methacholine challenge test as Dr. Heron had recommended to her own physician, Dr. Miller. There is no medical documentation of record indicating that the appellant submitted to such a test. Further, the agency has asserted that the appellant would have been assigned to a position with the least exposure to chemicals, that the agency had "extensive safety

precautions in the lab to prevent exposure to these chemicals," and that the appellant had worked in the lab for four years prior to 1980 with no apparent of documented problem. See PFR at 17-18. The appellant does not challenge these assertions in her response to the petition for review.

Therefore, we find that the appellant has failed to support her allegation that her sensitivity to chemicals warranted her absence from duty. Accordingly, we find that her refusal to report for duty in the lab as directed was improper and sustain that portion of the charge of failure to follow instruction, as well as the AWOL charge. 4 See Proctor v. Equal Employment Opportunity Commission, 27 M.S.P.R. 163, 168-169 (1985 (where an employee fails to show that the work environment does not

place the employee in danger of death or serious injury, the employee's AWOL and refusal to return to work warrant adverse action). See also Haymore v. Department of the Navy, 9 M.S.P.R. 499, 504 (1982) and Parker v. Department of the Interior, 4 M.S.P.R. 97, 100 (1980) (an employee's refusal to obey an order is proper only where the employee shows that obedience would result in death or seious bodily injury).

We note that the administrative judge did not consider the entire charge of failure to follow instructions. A portion of the charge related to the appellant's failure to notify her supervisor by June 28, 1988, of her intentions regarding her employment. The appellant does not assert that she was unable to notify the agency because of medical or other reasons. She

alleges in her response to the petition for review, however, that her attorney contacted the agency, but she does not specify the date of such contact, identify the individual with whom her attorney communicated, or disclose the content of such communication. See Response to Petition for rEview, PFR File at Tab 3. We therefore find that the appellant failed to notify her supervisor of her employment intentions as directed and that this portion of the charge of failure to follow instructions is also sustained.

The appellant failed to prove discrimination based on physical handicap.

Under 29 C.F.R. Sec. 1613.702(a), a handicapped person is defined "as one who: (1) Has a physical or mental impairment which substantially limits one or more of

such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment." Since we have found that the appellant has failed to establish a sensitivity to chemicals and a history of a substantial limitation upon employability, we find that she is not a handicapped person within the meaning of 29 C.F.R. Sec. 1613.702(a). See Forrisi v. Bowen, 794 F.2d 931, 933-34 (4th Cir. 1986) (the Rehabilitation Act covers "truly disabled, but genuinely capable, individuals"). Thus, we find that she has failed to make out a prima facie case of discrimination based on a physical handicap. See Savage v. Department of the Navy, 36 M.S.P.R. 148, 152 (1988), and Stalkfleet v. United States Postal Service, 6 M.S.P.R. 637, 647 (1981) (in order to establish a prima facie case of discrimination based on a

physical handicap, an appellant must prove, inter alia, that he or she is a handicaped person within the meaning of 5 C.F.R. Sec. 1613.702(a)). 5

The penalty of removal was reasonable.

Because we find the agency action sustained, we will address the reasonableness of the penalty imposed. See Douglas v. Veterans Administration, 5 M.S.P.R. 280, 306 (1981) (the Board will review the agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness).

The record shows that, at the time of her removal, the appellant had more than thirteen years of satisfactory government

service, over twelve of which were with the agency. See IAF at Tab 1 and Tab 6, Subtab 33. The record also shows, however, that on May 2, 1988, the appellant's supervisor officially reprimanded her for failing to follow his instructions to report for duty, as well for her AWOL. Id. at Subtab 18. Also, he warned her that her continued failure to provide the requested medical documentation, to notify him of her employment intentions, and to report for work could result in more serious discipline, including removal. Id. at Subtabs 18, 31. Nevertheless, the appellant failed to heed his warnings. The Board has held that removal for failure to follow instructions and /or AWOL may support the efficiency of the service. See Proctor, 27 M.S.P.R. at 168-69 (the penalty of removal for refusing to obey a proper order to return to work after a

period of AWOL was reasonable); Desiderio v. Department of the Navy, 4 M.S.P.R. 84, 85 (1980) (unauthorized absence from dity was held to be proper grounds for removal because of AWOL, by its very nature, disrupts the efficiency of the service). We find, therefore, that removal for the sustained charges was within the tolerable limits of reasonableness.

Order

This is the Board's final order in this appeal. 5 C.F.R. Sec. 1201.113(c).

Notice to Appellant.

You have the right to requst further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your

discrimination claims. See 5 U.S.C. Sec. 7702(b)(1). You must submit your request ot the EEOC at the following address: [address omitted]. You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your represenative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. Sec. 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not requst review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. See 5 U.S.c. Sec. 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt

of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. Sec. 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, antional origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. Sec. 2000e5(f); 29 U.S.C. Sec. 794a

Other claims: judicial review

If you choose not to seek review of the Board's decison on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Baord's final decision on other issues in your appeal if the court has jurisdiciton. See 5 U.S.C. Sec.

7703(b)(1). You must submit your request to the court at the following address: [omitted]. The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. Sec. 7703(b)(1).

For the board: Robert E. Taylor Clerk of the Board Washington, D.C.

[certificate of service omitted]

footnotes

1 The appellant had worked in an office setting immediately prior to her division's decision in 1988 to shift some of the work emphasis to the lab, to which she was reassigned. See Id. at Tab 6, Subtab 7.

2 We concur in the administrative judge's

findings that the appellant failed to prove that her removal was motivated by reprisal for having engaged in alleged protected activities and by discrimination based on sex. The appellant has not petitioned for review of these findings.

3 In fact, the Board has noted that 5 C.F.R. part 339, which was reviewed by the Office of Personnel Management in 1984, was intended to limit significantly the authority of agencies to order medical examinations for employees in light of previous abuses. See Abatecola v. Veterans Administration, 29 M.S.P.R. 601, 605, aff'd, 802 F.2d 471 (Fed. Cir. 1986) (table); 49 Fed. Reg. 1321 (1984).

4 The initial decision erroneously states that the appellant "was removed for absence without leave (AWOL) from May 16, 1988, thorugh the date of her removal . . . ." Initial Decision at 1, IAF, Tab 23;

See Allen v. Veteran Administration, 38 M.S.P.R. 31, 33(1988) (it is error for an administrative judge to consider in an AWOL charge any period of absence not stated in the proposal notice). The record shows that, with respect to the AWOL charge, the agency relied only on the period stated in the proposal notice, May 16, 1988, to July 15, 1988, in removing the appellant. However, the administrative judge's adjudicatory error was not prejudicial to the appellant's substantive rights and, therefore, does not warrant reversal of the initial decision based on that error. See Panter v. Department of the Air Force, 22 M.S.P.R. 281, 282 (1984).

5 Since we have found no discrimination by the agency based on physical handicap, we need not address the agency's contention that the Board "should reject" the holding

in Ignacio v. United States Postal Service, 30 M.S.P.R. 471, 486-87 (Spec. Pan. 1986), that an agency is required to consider reassignment as a reasonable accommodation of a qualified handicapped employee. See PFR at 21-22.